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No.

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

— o —
IN RE: CASSIDY LAND
AND CATTLE COMPANY, INC.,

Debtor,

McCARTY RANCH TRUST, *et al.*,

Petitioners,

v.

ROBERT F. CRAIG, TRUSTEE OF
CASSIDY LAND AND CATTLE COMPANY, INC.,

Respondent.

— o —
**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

— o —
WILLIAM J. RIEB
P.O. Box 1682
Sioux City, Iowa 51102
(402) 494-5353

*Attorney for the Petitioners,
McCarty Ranch Trust and
Lynda Cassidy Taylor Logemann*

April 1988

QUESTION PRESENTED

Whether Congress could constitutionally give a non-Article III Bankruptcy Court power and jurisdiction to conduct traditional State-denominated mortgage foreclosures of real property pursuant to the *post-Marathon core proceedings* statute of 28 U.S.C. § 157(b)(2).

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ROBERT F. CRAIG, TRUSTEE OF
CASSIDY LAND AND CATTLE COMPANY, INC.,

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**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Lynda Cassidy Taylor Logemann, individually and as
trustee for the Petitioner, McCarty Ranch Trust, petitions

* All of the parties in the United States Court of Appeals for the Eighth Circuit are listed in the caption, except Lynda Cassidy Taylor Logemann, individually and in her capacity as Trustee of the Petitioner, McCarty Ranch Trust.

** Respondent has no parent companies, subsidiaries or affiliates.

for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, 1a) is reported at 836 F 2d 1130. The opinion of the district court (App. B, *infra*, 9a) is reported at 69 B.R. 649.

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JURISDICTION

The judgment of the Court of Appeals was entered January 12, 1988. Timely *Petition for Rehearing* was filed, and was denied on February 10, 1988 (App. C, *infra*, 15a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. *Article III* to the *United States Constitution* provides in relevant part:

“Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their offices

during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

"Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States—to Controversies between—Citizens or Subjects."

2. 28 U.S.C. § 157(b)(2), the *core proceedings* statute of the *post-Marathon Bankruptcy Amendments and Federal Judgeship Act of 1984*, Public Law No. 98-353, provides in relevant part:

"Core proceedings include, but are not limited to—

- (A) Matters concerning the administration of the estate;—
- (E) Orders to turn over property of the estate;—
- (O) Other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor—relationship—."

STATEMENT

1. In 1982, this Court struck down § 1471(c) of *The Bankruptcy Reform Act of 1978* as an unconstitutional delegation of Article III judicial power to nontenured Article I bankruptcy judges in violation of the separation of powers doctrine. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (*Marathon*); 28 U.S.C. § 1471(c).

Thereafter, the Congress of the United States of America created *The Bankruptcy Amendments and Fed-*

eral Judgeship Act of 1984, Public Law No. 98-353, codified in pertinent part, into 28 U.S.C. § 157(b)(2), the *core proceedings* statute. (*1984 Amendments*).—

Thus, the *1984 Amendments* and the pertinent *core proceedings* statute (28 U.S.C. § 157(b)(2)) became the Congressional response to the unconstitutionally fatal § 1471(c) of 28 U.S.C. of *The Bankruptcy Reform Act of 1978*.

The *core proceedings* statute, *supra*, then, attempts to circumscribe, define, and otherwise limit by permissible judicial construction, the traditional powers and jurisdiction that have always been associated with and related historically, functionally, and traditionally to the bankruptcy courts, hopefully, in accord constitutionally, with the mandate of *Marathon*.

2. In 1984, shortly after the passage of the *1984 Amendments*, Respondent-Debtor through its trustee, commenced an adversary action in the United States Bankruptcy Court for the District of Nebraska. The trustee brought, *inter alia*, two real estate mortgage foreclosure actions against Nebraska State privately-owned patented lands involving around 13,500 acres. The two mortgages foreclosed upon, secured loans privately contracted by the Petitioner, the McCarty Ranch Trust with the Respondent, before Respondent went bankrupt. One loan was for \$2,123,000.00 and another was for \$25,196.13. Both loans were evidenced by promissory notes which the mortgages secured.

After Respondent-Debtor plunged into bankruptcy, the trustee's first and only order of business was to bring these mortgage foreclosure actions, one of which was

against the Petitioner, the McCarty Ranch Trust, which stood in relation to the Respondent-Bankrupt as an innocent private party, not involved in any bankruptcy proceedings itself.

Summary Judgment went in favor of Respondent on March 12, 1985.

About a year later, on or about March 4, 1986, Lynda Cassidy Taylor Logemann, individually on behalf of herself and as the trustee for the Petitioner, the McCarty Ranch Trust, realizing the significance of the Supreme Court's decision in *Marathon*, commenced pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure, a *Motion for Relief from Judgment* of the Decree of March 12, 1985, declaring that pursuant to *Marathon* and the *core proceedings* statute of 28 U.S.C. § 157(b)(2), the judgment was void, and further, the bankruptcy court was without jurisdiction to do mortgage foreclosures pursuant to the *core proceedings* statute of the 1984 Amendments. This Motion was initially brought in the United States Bankruptcy Court for the District of Nebraska.

In August 1986, the Bankruptcy Judge denied Petitioner's *Motion for Relief from Judgment* holding that the mortgage foreclosures as postured in this factual setting were core proceedings. The Judge then entered *Orders Confirming the Sale* of the 13,500 acres to the trustee of the Respondent-Debtor.

An appeal immediately followed to the United States District Court for the District of Nebraska. The District Court affirmed the Bankruptcy Court on January 30, 1987.

An appeal then followed to the United States Court of Appeals for the Eighth Circuit and the Court of Ap-

peals affirmed the District Court and the Bankruptcy Court on January 12, 1988. (App. A, *infra*, 1a).

Petitioners then filed a *Petition for Rehearing by Panel* in the Court of Appeals, which was denied on February 10, 1988. (App. C, *infra*, 15a).

Believing that the Court of Appeals for the Eighth Circuit has ignored the *Marathon* case as it applies to the 1984 Amendments, serving as a constitutional check on the core proceedings statute of the 1984 Amendments, Petitioners, the McCarty Ranch Trust and Lynda Cassidy Taylor Logemann, have now come to present this unprecedented case to this preeminent Tribunal as the highest and most final arbiter to determine whether once again, as it did with *The Bankruptcy Reform Act of 1978*, *The Bankruptcy Amendments and Federal Judgeship Act of 1984* and its core proceedings statute, complies with the *United States Constitution*.

In particular, Petitioners are concerned whether the legal relationships that this case presents which are identical to those of *Marathon*, were correctly decided by the Court of Appeals. Petitioners are further concerned whether Congress could constitutionally give, a non-Article III Bankruptcy Court, in the 1984 Amendments, such broad and far-reaching powers and jurisdiction similar to those struck down by *Marathon* in § 1471(c) of 28 U.S.C. of *The Bankruptcy Reform Act of 1978*.

The prodigious powers granted by Congress in the 1984 Amendments and interpreted by the Court of Appeals in this case leave no doubt that an inferior non-Article III Bankruptcy Court has free rein to collect a pre-petition created State law debt of a non-bankrupt

party *via* a traditionally State-denominated mortgage foreclosure action of privately-owned State patented real property, and as a consequence of this foreclosure, be able to sell this real property, all without constitutional safeguards that only an Article III Court can bestow.

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REASONS FOR GRANTING THE PETITION

Nearly eight out of every ten cases reaching the bankruptcy court system, have had as its progenitor, a mortgage foreclosure action. The default upon the debt and the mortgage foreclosure proceeding have, in the usual case, been commenced in State Court before the bankruptcy petition has been filed. Invariably, the bankruptcy court also allows the creditor to finish its mortgage foreclosure, according to State law, outside of the bankruptcy court.

This case involves far-reaching ramifications into the contours and limits of the jurisdictional powers of the Federal bankruptcy system given to it by the *1984 Amendments*. It is a case which will either continue to expand or limit the powers of the bankruptcy courts pursuant to the *core proceedings* statute of the *1984 Amendments*.

The case will also develop a scenario as to the future scope and direction in which the "other" powers enumerated in the *core proceedings* statute will take.

Lastly, this case represents a wresting of the jurisdictional power away from the several States and reposed in them by the lower Federal Courts, not meant by the

framers of the *United States Constitution*, the *Marathon* case and the *1984 Amendments* itself.

I.

National Importance Of The Case

This case involves *Marathon II*. Further, it should be the only bankruptcy case the Supreme Court should hear and determine this Term. The *Petition for a Writ of Certiorari* raises unresolved constitutional and jurisdictional questions under the new *core proceedings* statute of *The Bankruptcy Amendments and Federal Judgeship Act of 1984* of national importance.

In the proper administration of the national bankruptcy system, public policy would mandate that this Court grant certiorari so the national public interest can be free of the ambiguous provisions and interpretations of the *core proceedings* statute which is codified into 28 U.S.C. § 157(b)(2).

II.

Conflict With This Court's Decision In *Marathon*

This case, decided as it was by the Court of Appeals, is constitutionally at odds with and in contravention of the Supreme Court's decision in *Marathon*.

The *Marathon* case was central to this case in the Court of Appeals and the lower Courts. However, the Court of Appeals ignored *Marathon* and went off on a course and direction far deviant from the teachings of *Marathon*.

The Court of Appeals decided this case upon its own carefully chosen narrow spectrum of facts, instead of the constitutional law that *Marathon* mandates.

The facts chosen by the Appeals Court were that the \$2,123,000.00 debt was the sole asset of the bankruptcy estate and that this debt and mortgage were executed in favor of the Respondent-Debtor. Since the Respondent was in bankruptcy, it was all too easy for the Appeals Court to reason that it had the right to collect the debt under the *turn-over* statute of 28 U.S.C. § 157(b)(2)(E).

The Court of Appeals never did decide directly whether bankruptcy courts have jurisdiction to do mortgage foreclosures in the constitutional framework of *Marathon* and the 1984 Amendments.

In so doing, the Court of Appeals "carved out" to its liking its own unprecedented ruling, creating more havoc, confusion, and ambiguity in a law already shrouded in mystery, than if this case never came before the bench.

What precedential value is the Court of Appeals' ruling when that Court itself said this is a unique case, only to find that it only applies to a very narrow band of cases, maybe one in a million?

If such be the case, the application of the Court of Appeals' decision is relatively worthless; however, it does complement further ambiguity instead of creating a clear precedent for which was the duty of the Court of Appeals and for which this case was first commenced.

III.

Conflict With Other Appellate Decisions

1. *Matter of Wood*, 825 F 2d 90 (5th Cir. 1987). The decision in the case at bar directly conflicts with *Wood*. In a bankruptcy case, a complaint seeking damages and declaratory relief, was brought by one against the Debtors-Wood. The Plaintiff sought to recover stock and monies that Debtors allegedly misappropriated before bankruptcy. The Fifth Circuit Court of Appeals held the suit to be a related, non-core proceeding because it was based upon State created rights instead of rights created by Federal bankruptcy law. The Court held it was simply a State contract action that, had there been no bankruptcy, the case could have proceeded in State Court. The Court of Appeals for the Fifth Circuit further held that the case was a related proceeding because the Plaintiff had not filed a proof of claim and had not invoked the *peculiar* powers of the bankruptcy court. The *Wood* case fits the legal relationships in the case at bar.

2. *In Re Arnold Print Works, Inc.*, 815 F 2d 165 (1st Cir. 1987). The hypothetical factual pattern extrapolated at the beginning of the opinion in *Arnold* leaves no doubt that had that Court been faced with the same facts as the case at bar, the resultant holding of that Court would have had that case within the exact same legal posture of the case at bar with *Marathon*. Therefore, the bankruptcy court, in this case, would have lacked the constitutional power to adjudicate a mortgage foreclosure.

The Court in *Arnold* left no doubt that it clearly understood the legal relationships and holding of *Marathon* when it said:

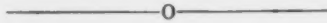
“Assume that B, a bankrupt company in the midst of federal bankruptcy proceedings, brings an ordinary State law contract claim against D, a private party, seeking money that D allegedly owed B before B went bankrupt.”

This is the exact same situation as Petitioners now present to the Supreme Court.

IV.

The Federal Question Herein Has Not Heretofore Been Specifically Determined By This Court

This writer knows, after considerable research, of no other case previously determined by this Court or now pending, that raises this question of first impression.



CONCLUSION

The *Petition for a Writ of Certiorari* should be granted.

Respectfully submitted,

WILLIAM J. RIEB
P.O. Box 1682
Sioux City, Iowa 51102
(402) 494-5353

*Attorney for the Petitioners,
McCarty Ranch Trust and
Lynda Cassidy Taylor Logemann*



APPENDIX A

Opinion of the United States Court of Appeals
for the Eighth Circuit
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APPENDIX B

Opinion of the United States District Court
for the District of Nebraska
9a-14a

APPENDIX C

Order Denying Rehearing
15a

APPENDIX D

Judgment of the United States Court of Appeals
for the Eighth Circuit
16a-17a

APPENDIX A

In re CASSIDY LAND AND CATTLE
CO., INC., Debtor

Robert F. CRAIG, Trustee of Cassidy
Land and Cattle Co., Inc., Appellee,

v.

McCARTY RANCH TRUST, et al,
Appellants.

No. 87-1181.

United States Court of Appeals, Eighth Circuit.

Submitted Sept. 4, 1987.

Decided Jan. 12, 1988.

Trustee brought adversary proceeding to foreclose mortgage held by debtor. The Bankruptcy Court granted summary judgment for trustee, and mortgagors appealed. The United States District Court for the District of Nebraska, Clarence Arlen Beam, Chief Judge, 69 B.R. 649, affirmed and appeal was taken. The Court of Appeals, Ross, Senior Circuit Judge, held that proceeding initiated by debtor to foreclose upon \$2,000,000 note secured by mortgage, which constituted sole asset of bankruptcy estate, was core proceeding over which bankruptcy court had jurisdiction to enter final order, in that proceeding initiated by debtor amounted to action based on turn-over of matured debt that was property of estate.

Affirmed.

1. Bankruptcy Key No. 2049

Proceeding initiated by debtor to foreclose upon \$2,000,000 note secured by mortgage, which constituted sole

asset of bankruptcy estate, was core proceeding over which bankruptcy court had jurisdiction to enter final order, in that proceeding initiated by debtor amounted to action based on turnover of matured debt that was property of estate. Bankr.Code 11 U.S.C.A. § 542(b); 28 U.S.C.A. § 157(b).

2. Bankruptcy Key No. 2124

Bankruptcy court had authority to appoint receiver in adversary proceeding brought by bankruptcy trustee to foreclose mortgage, for limited purpose of administering mortgaged property pending deposition of foreclosure proceeding.

William J. Rieb, Sioux City, Iowa, for appellant.

Robert Craig, Omaha, Neb., for appellee.

Before HEANEY, Circuit Judge,
ROSS, Senior Circuit Judge, and
BOWMAN, Circuit Judge.

ROSS, Senior Circuit Judge.

This matter arises out of an adversary proceeding brought by Robert F. Craig, in his capacity as trustee for the debtor/appellee, Cassidy Land & Cattle Company, Inc. (Cassidy Land) seeking to foreclose upon certain mortgages held by the bankrupt estate and executed in favor of the bankrupt by the appellant, McCarty Ranch Trust.

On July 19, 1982, appellee filed a petition for voluntary bankruptcy under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* In January of 1982, approximately

six months prior to the initiation of the Chapter 11 proceedings, Cassidy Land transferred to appellants, several thousand acres of ranch land located in the Nebraska sandhills. In return McCarty Ranch Trust executed two notes and mortgages in excess of two million dollars in favor of Cassidy Land. The mortgage instruments provided for acceleration of the entire debt in the event of default. It is undisputed that at the time of the foreclosure proceeding the notes and mortgages were in default.

Subsequently, Robert Craig, as trustee for the bankrupt estate, initiated foreclosure proceedings in the bankruptcy court for the district of Nebraska against McCarty Ranch Trust. The bankruptcy court granted summary judgment in favor of Craig on March 12, 1985 and Craig proceeded with execution on his judgment of foreclosure. The appellant, Lynda Taylor, individually and as trustee for the defendant McCarty Ranch Trust, filed a motion for relief from judgment, claiming that the bankruptcy court was without jurisdiction to conduct the foreclosure proceeding. The bankruptcy court denied Taylor's motion and entered orders confirming the sale. Taylor appealed the decision to the district court for the district of Nebraska, again arguing that the bankruptcy court lacked jurisdiction to conduct the foreclosure proceeding.

Finding that the foreclosure constituted a "core proceeding" within the meaning of 28 U.S.C. § 157(b), the district court, 69 B.R. 649, determined that the bankruptcy court had proper jurisdiction over the foreclosure proceeding and accordingly affirmed the bankruptcy court's ruling. Appeal to this court followed.

Discussion

I.

The initial issue presented by this appeal is whether a bankruptcy court has jurisdiction to conduct the foreclosure of a mortgage which is executed in favor of the bankrupt and which constitutes the sole asset of the bankrupt estate. 28 U.S.C. §§ 1471(a) and (b) of the Bankruptcy Reform Act of 1978 (1978 Act) initially conferred upon federal district courts "original and exclusive jurisdiction of all cases under title 11," and original jurisdiction "of all civil proceedings arising under title 11 or arising in or related to cases under title 11." Section 1471(c) of the 1978 Act then vested in the bankruptcy courts the identical broad grant of jurisdictional authority: "[t]he bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts."

In 1982, the Supreme Court had the opportunity to consider the newly enacted Bankruptcy Reform Act and determined that section 1471(c) unconstitutionally delegated Article III judicial power to nontenured Article I bankruptcy judges in violation of the separation of powers doctrine. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (*Marathon*). In order to meet the challenges of the Supreme Court, Congress amended the 1978 Act by repealing the jurisdictional provisions contained in sections 1471 through 1482 and enacting the Bankruptcy Amendments and Federal Judgeship Act of 1984 (1984 Amendments).

28 U.S.C. §§ 1334(a) and (b) of the 1984 Amendments, confers upon the federal district courts the same jurisdictional authority that they had acquired under sections 1471

(a) and (b) of the 1978 Act; however, there is no longer a provision analogous to former section 1471(c). In contrast to 1471(c), 28 U.S.C. § 157 of the 1984 Amendments does not give bankruptcy courts the full judicial power enjoyed by district courts under section 1334. Instead, with respect to proceedings other than the bankruptcy petition itself, section 157 divides all proceedings into two categories. Subsection 157(b)(1) confers upon bankruptcy judges the power to determine "all core proceedings arising under title 11, or arising in a case under title 11" and to enter appropriate orders and judgments. Subsection 157(c)(1), on the other hand, gives the bankruptcy judge only limited power to hear "a proceeding that is not a core proceeding but that is otherwise related to a case under title 11." The bankruptcy judge may hear such a related proceeding, but the judge may not enter a final judgment or order absent consent by the parties to the bankruptcy court's jurisdiction. 28 U.S.C. § 157(c)(2). Instead, the bankruptcy judge is limited to submitting findings of fact and conclusions of law to the district court for de novo review of matters objected to. *Id.* The distinction between core and noncore proceedings is at the heart of Congress's response to the Supreme Court's ruling in *Marathon*.

Since the enactment of the 1984 Amendments, many courts have sought to interpret its ambiguous provisions, attempting to distinguish between proceedings that "arise in," "arise under" or are "related to" cases under title 11. We make no such comprehensive interpretation of the statute, but instead limit our analysis to the facts of this case.

[1] In the case before us the issue is whether a proceeding initiated by the bankrupt to foreclose upon a two

million dollar note secured by a mortgage, which constitutes the sole asset of the bankrupt estate, is a core proceeding within the meaning of section 157(b).

The statute does not define core proceedings: however, 28 U.S.C. § 157(b)(2) does provide a nonexclusive list of proceedings designated as "core" including two "catch-all" provisions, "matters concerning the administration of the estate," § 157(b)(2)(A), and "other proceedings affecting the liquidation of the assets of the estate," § 157(b)(2)(O). Courts have cautioned against a broad interpretation of these catchall provisions for fear of emasculating the mandate of *Marathon*. *In re Wood*, 825 F.2d 90, 95 (5th Cir.1987). Under a broad reading of section 157(b)(2)(A) and (O), even the state law contract claim at issue in *Marathon* would constitute a core proceeding.

Also enumerated in section 157(b)(2) is a list of more specific provisions, including "orders to turn over property of the estate." § 157(b)(2)(E). A turnover proceeding is defined by the Bankruptcy Code as an action based on "a debt that is property of the estate and that is matured, payable on demand, or payable on order." 11 U.S.C. § 542(b).

The mortgage in the instant case contained an acceleration clause which provided that the entire debt under the note would be due and payable in the event of a default. McCarty Ranch Trust's nonpayment of amounts owing constituted a default within the terms of the mortgage instrument and, therefore, rendered the notefully matured. *See Jones v. Burr*, 389 N.W.2d 289, 293 (Neb.1986) citing *United Benefit Life Ins. Co. v. Holman*, 130 N.W.2d 593,

595-96 (Neb.1964). It follows, then, that the foreclosure proceeding initiated by Cassidy Land amounted to an action based on the turnover of a matured debt that is the property of the bankrupt estate within the meaning of 11 U.S.C. § 542(b). Given that a turnover proceeding is expressly enumerated as a core proceeding under section 157(b)(2)(E), we hold that the bankruptcy court had proper jurisdiction to conduct the foreclosure proceeding.

We note as significant the unique nature of this foreclosure and limit our holding to the facts of this case. A mortgage foreclosure can only be a turnover proceeding within the meaning of section 542(b) when the bankrupt is the holder of the note and mortgage which is sought to be foreclosed. Only then is the mortgage "property of the estate." We distinguish the case before us from the typical foreclosure associated with a bankruptcy proceeding wherein the bankrupt is the party against whom foreclosure proceedings are brought and we do not pass judgment as to whether that type of proceeding is a core proceeding.

We also note as significant the fact that the two million dollar note secured by the mortgage constitutes the sole asset of the bankrupt estate. See *In re Dogpatch U.S.A., Inc.*, 810 F.2d 782, 785 (8th Cir. 1987). Although this fact alone is not determinative of a core proceeding, we note that the prompt collection of these assets is essential to the expeditious administration of the bankruptcy proceeding. See 28 U.S.C. § 157(b)(2)(A); *Willis v. Ryan*, 56 B.R. 204, 206 (D.Kan.1986).

II.

[2] Appellant also argues that the bankruptcy court exceeded its authority by appointing a receiver in the foreclosure proceeding. 11 U.S.C. § 105(b) prohibits the bankruptcy court from appointing such a receiver "in a case under this title." The district court rejected appellant's argument reasoning that section 105(b) is inapplicable to the foreclosure proceeding which is not a case under title 11 but instead is an adversary proceeding brought by the trustee to foreclose a mortgage. The power of the bankruptcy judge precluded by section 105(b) of the Bankruptcy Code is the power to appoint a receiver for the estate in lieu of a trustee. *In re Memorial Estates, Inc.*, 797 F.2d 516, 520 (7th Cir.1986). Section 105(b) is not addressed to the power of the bankruptcy court to appoint a receiver at the request of the trustee for the limited purpose of administering the mortgaged property pending disposition of the foreclosure proceeding.

We conclude, therefore, that the bankruptcy court exercised proper authority in appointing a receiver in the foreclosure proceeding.

The judgment of the district court is affirmed.

APPENDIX B

In re CASSIDY LAND & CATTLE CO., INC., Debtor.
Robert F. CRAIG, Trustee of Cassidy
Land & Cattle Co., Inc., Plaintiff,

v.

McCARTY RANCH TRUST, et al., Defendants.
Bankruptcy No. BK 82-1257.

No. CV 86-0-704.

United States District Court, D. Nebraska.

Jan. 30, 1987.

Trustee brought adversary proceeding to foreclose mortgages held by debtor. The Bankruptcy Court granted trustee's motion for summary judgment, and mortgagors appealed. The District Court, Beam, Chief Judge, held that adversary proceeding brought by trustee to foreclose on mortgages constituted "core proceeding," which bankruptcy court could hear and finally adjudicate.

Affirmed.

See also, Bkrtey., 62 B.R. 93.

1. Mortgages Key No. 386

Mortgage foreclosure action is by nature an equitable proceeding, subject to general equity jurisdiction of federal courts.

2. Bankruptcy Key No. 293(1)

Adversary proceeding brought by trustee to foreclose on mortgages held by debtor constituted "core proceeding," which bankruptcy court could finally determine. 28 U.S.C.A. § 157(b)(3).

See publication Words and Phrases for other judicial constructions and definitions.

3. Mortgages Key No. 467(1)

Bankruptcy statute, which prohibited court from appointing receiver in "case" under Bankruptcy Code, did not prohibit appointment of receiver in adversary "proceeding" brought by trustee to foreclose on mortgages. Bankr.Code, 11 U.S.C.A. § 105(b).

See publication Words and Phrases for other judicial constructions and definitions.

Kennedy, Holland Law Firm, Stuart Paulson, Omaha, Neb., for plaintiff.

D. Lynda Taylor Logemann, Trustee for McCarty Ranch Trust.

William J. Rieb, Sioux City, Iowa, for defendants.

ORDER

BEAM, Chief Judge.

This matter is before the Court on appeal from an order of the Bankruptcy Court for the District of Nebraska entered August 8, 1986, denying Linda Logemann, trustee of the defendant McCarty Ranch Trust's motion for relief from judgment. Upon full review of the record and the materials submitted by the parties, the Court finds that the decision of the Bankruptcy Court should be affirmed.

BACKGROUND

This action arises out of an adversary proceeding brought by Robert F. Craig, as trustee of the debtor Cas-

sidy Land & Cattle Co., Inc., seeking foreclosure of certain mortgages executed in favor of Cassidy by the defendants. The Bankruptcy Court granted Craig's motion for summary judgment on March 12, 1985, and Craig proceeded with execution on his judgment of foreclosure. The appellant, trustee for the defendant McCarty Ranch Trust, then filed a motion for relief from judgment, claiming that the Bankruptcy Court was without jurisdiction to conduct foreclosure proceedings pursuant to state law. The plaintiff had meanwhile sold the property at a public sale and filed a motion for confirmation of the sale. Following separate hearings, the Bankruptcy Court entered orders confirming the sale and denying defendant's motion for relief from judgment. This appeal followed.

DISCUSSION

Appellant relies on the United States Supreme Court's decision in *Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) for the proposition that the Bankruptcy Court did not have jurisdiction to conduct the mortgage foreclosure proceedings at issue. *Marathon* involved the extent to which Article III of the United States Constitution limits the jurisdictional powers of the United States Bankruptcy Courts. In regard to the constitutional ability of an adjunct Bankruptcy Court to determine state law issues, a divided Supreme Court was "unable to agree on the precise scope and nature of Article III's limitations. The Court's holding in [Marathon] establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without con-

sent of the litigants, and subject only to ordinary appellate review.” *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 105 S.Ct. 3325, 3335, 87 L.Ed.2d 409, *citing Marathon*, 458 U.S. at 84, 102 S.Ct. at 2878. *Marathon* did not “implicate the jurisdiction of the Bankruptcy Courts in other matters within the ‘traditional’ bankruptcy jurisdiction.” *In re Kaiser*, 722 F.2d 1574, 1580 (2d Cir.1983). Chief Justice Burger explained the limitations of the *Marathon* plurality:

I write separately to emphasize that, notwithstanding the plurality opinion, the Court does *not* hold today that Congress’ broad grant of jurisdiction to the new bankruptcy courts is generally inconsistent with Article III. . . . Rather, the Court’s holding is limited to the proposition stated by Justice Rehnquist in his concurrence in the judgment—that a ‘traditional’ state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, absent consent of the litigants, be heard by an ‘Article III court’ if it is to be heard by any court or agency of the United States.

Marathon, 458 U.S. at 92, 102 S.Ct. at 2882 (Burger, C.J., dissenting).

[1] In arguing that *Marathon* precludes the Bankruptcy Court from conducting a foreclosure, it may be that the appellant fails to recognize a basic characteristic of a mortgage foreclosure proceeding. A mortgage foreclosure action is by nature an *equitable* proceeding, subject to the general equity jurisdiction of the federal courts, following principles and rules of practice established by courts of equity in the exercise of their general jurisdiction. *See, e.g., Tilden v. Beckmann*, 203 Neb. 293, 278 N.W.2d 581

(1979); *Wittwer v. Dorland*, 198 Neb. 361, 253 N.W.2d 26 (1977); *Lincoln Joint Stock Land Bank v. Barnes*, 143 Neb. 58, 8 N.W.2d 545 (1943). While this Court does not here find that every proceeding in equity is outside the *Marathon* holding, *Marathon* does not effect the Bankruptcy Court's power to exercise jurisdiction over "core proceedings," especially those proceedings which are equitable in nature.

Cases that can be properly characterized as 'core proceedings' are those which are considered equitable in nature and for which traditionally no right to a jury trial exists. [citations omitted.] Bankruptcy judges are free to hear and finally determine such cases because they are in the nature of an equitable proceeding.

Cameron v. Anderson, 50 B.R. 175, 180 (Bankr.N.D.1985).

[2] Further, any determination that a proceeding is or is not a core proceeding is not to be "made solely on the basis that its resolution may be affected by State law." 28 U.S.C. § 157(b)(3). The foreclosure of mortgages held by the debtor involves questions which not only concern the administration of the estate and the liquidation of its assets, but the determination of the extent and validity of certain liens. *Shell Materials, Inc. v. First Bank of Pinellas County*, 50 B.R. 44, 46 (Bankr.M.D.Fla.1985). Such foreclosures, initiated by the trustee to recover property for the bankruptcy estate, can hardly be regarded as being "related only peripherally" to the adjudication of the bankruptcy. As such, the Court finds these proceedings to be core proceedings, directly related to the adjudication of the bankruptcy and equitable in nature, fully within the jurisdiction of the Bankruptcy Court. The Bank-

ruptcy Court, therefore, properly held that, regardless of *Marathon*, it has jurisdiction regarding equitable actions to aid the trustee in gathering assets and determining the extent and priority of liens. The Bankruptcy Court correctly denied appellant's motion for relief from judgment.

[3] The appellant additionally argues that the Bankruptcy Court was without jurisdiction to appoint a receiver in this case.¹ Appellant relies on 11 U.S.C. § 105(b) which prohibits the Bankruptcy Court from appointing a receiver "in a case under this title." *Id.* Section 105(b) is not applicable to these facts. A receiver was not appointed in the "case" below, but in an adversary proceeding brought by the trustee to foreclose a mortgage. A bankruptcy case and a bankruptcy proceeding are separate and distinct, and while a receiver may not be appointed in lieu of a trustee for the estate, one certainly may be appointed pursuant to applicable state law in an adversary proceeding. *In re Memorial Estates, Inc.*, 797 F.2d 516, 520 (7th Cir.1986). The Bankruptcy Court's appointment of a receiver here was within its jurisdiction and proper under the circumstances.

Accordingly,

IT IS ORDERED that the decision of the Bankruptcy Court should be and hereby is affirmed.

1. This issue was raised below only during oral argument on the trustee's motion for confirmation of sale. While the Court finds it doubtful that the issue was properly preserved for appeal in connection with the motion for relief from judgment, the issue can and will be easily disposed of on the merits.

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 87-1181NE

| | | |
|------------------------------|---|-----------------|
| In Re: Cassidy Land and |) | |
| Cattle Co., Inc., |) | |
| |) | |
| Robert F. Craig, etc., |) | Appeal from the |
| |) | United States |
| |) | District Court |
| |) | for the |
| vs. |) | District of |
| |) | Nebraska. |
| McCarty Ranch Trust, et al., |) | |
| |) | |
| Appellants. |) | |

Appellants' petition for rehearing has been considered
by the Court and is denied.

February 10, 1988

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals,
Eighth Circuit.

/s/ LP

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
JUDGMENT

No. 87-1181NE

| | | |
|------------------------------|---|---------------------|
| |) | Filed Jan. 12 1988 |
| |) | Robert D. St. Vrain |
| |) | Clerk |
| |) | |
| In Re: Cassidy Land and |) | Bk. 82-1257 |
| Cattle Co., Inc., Debtor |) | Cv. 86-0-704 |
| |) | Appeal from the |
| Robert F. Craig, Trustee of |) | United States |
| Cassidy Land and Cattle Co., |) | District Court |
| Inc., |) | for the District |
| |) | of Nebraska |
| Appellee, |) | Filed |
| |) | District of |
| vs. |) | Nebraska |
| |) | at _____ M |
| McCarty Ranch Trust, et al., |) | Feb 22 1988 |
| |) | William L. Olson, |
| Appellants. |) | Clerk |
| |) | By _____ |
| |) | Deputy |

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

January 12, 1988

Appellee will recover from appellant the sum
of \$80.50 for taxable costs on appeal.

A true copy.

/s/ Robert D. St. Vrain

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT
MANDATE ISSUED 2/18/88
